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No. 94-455

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In The
Supreme Court of the United States
October Term, 1994

TYSON JOHNSON, *et al.*,
Petitioners,
v.
HOUSTON JONES,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

BRIEF OF THE STATES OF MARYLAND, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, WISCONSIN, AND WYOMING, THE DISTRICT OF COLUMBIA, THE COMMONWEALTH OF PUERTO RICO, AND THE TERRITORY OF GUAM AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether, in an action under 42 U.S.C. § 1983, a public official may challenge on interlocutory appeal the denial of the official's motion seeking summary judgment on qualified immunity grounds when the plaintiff has failed to adduce any evidence of wrongful conduct.

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Pursuant to Sup. Ct. R. 37, the forty-five signatory States, the District of Columbia, the Commonwealth of Puerto Rico, and the Territory of Guam respectfully submit this brief as *amici curiae* in support of petitioners.

INTEREST OF *AMICI CURIAE*

This case presents an important question concerning the right of state officials to appeal immediately orders denying them summary judgment on the basis of qualified immunity. Resolution of the question is of major significance to the states because it will in many instances determine the full effectiveness of the qualified immunity defense available to state officials in actions brought under 42 U.S.C. § 1983. That defense, of immediate, personal importance to the individual officials sued in a particular case, provides a valuable benefit to the states by removing a disincentive to entry into state service and by promoting the vigorous discharge of public duties.

The restriction of immediate appeals of qualified immunity rulings would undermine the very reasons for the immunity defense. The specter of protracted litigation and potential personal liability would deter able individuals from entering state service and would hamper independent and vigorous decisionmaking by those serving as state officials. Engagement in litigation also would unduly distract public servants from productive service. Denying an immediate appeal and forcing state officials to proceed with discovery and trial would impose litigation expenses on states which extend representation to certain officials at public expense.

Allowance or disallowance of immediate appeals based on whether the issues presented are predominantly "legal" or "factual" would institute a meaningless and unworkable distinction. The vast majority of state officials, particularly law enforcement officers, function in a daily environment dominated by complex and

varying facts, not abstract law. Their decisions rarely, if ever, turn on purely legal considerations. As an effective response to this reality, the qualified immunity doctrine has evolved to embody an objective test not only of abstract legal principles, but of the application of law to facts. In the same way, the companion doctrine permitting immediate appeals will be effective only if it comprehends the entire range of qualified immunity defenses.

STATEMENT

Petitioners Tyson Johnson, Robert Deevey, and John Payne are police officers in Villa Park, Illinois. On November 6, 1990, they responded to assist a fellow officer, John Heidelmeier, with respondent Houston Jones. Before the three petitioners and one other officer, Genaro Esposito, arrived at the scene, Officer Heidelmeier had discovered respondent Jones, apparently intoxicated, hitting his head against a building. An altercation between Jones and Officer Heidelmeier occurred as the officer attempted to arrest and handcuff Jones for disorderly conduct. The petitioner officers assisted Officer Heidelmeier in handcuffing Jones. After Jones arrived at the police station, he was treated for trauma, including several broken ribs. Pet. App. 4a-5a.

Respondent Jones sued all of the officers in the United States District Court for the Northern District of Illinois under 42 U.S.C. § 1983. He alleged in part that the officers used excessive force against him both at the scene of the arrest and subsequently at the police station and that they were liable for illegal arrest, false imprisonment, and malicious prosecution. Jones claimed that he was not intoxicated but was suffering an adverse

insulin reaction. He disclaimed any memory of the alleged attack, stating that he could only remember experiencing pain and seeing Officers Heidelmeier and Esposito at the police station. Pet. App. 4a-6a.

All of the officers moved for summary judgment on the basis of qualified immunity. The petitioners submitted sworn statements that no one beat, struck, or abused Jones during the arrest; that their involvement with Jones ended after the arrest was made; and that they saw no one abuse Jones at the police station. With respect to the false arrest and related claims, petitioners argued that their qualified immunity was established by the existence of probable cause to arrest Jones. Pet. App. 4a-5a, 8a.

The district court denied the motions for summary judgment. Pet. App. 8a-10a. With respect to the alleged use of excessive force, the court concluded that circumstantial evidence might support respondent's theory of the case, even though he was unable to advance any witness to support his allegations. Pet. App. 7a-8a. The court decided that the false arrest claim should be tried because the excessive force claims required a trial and "there is substantial overlap between the claims of excessive force and lack of probable cause, and because there is at least some possibility plaintiff could prove lack of probable cause . . . ." Pet. App. 9a-10a.

The three petitioners sought immediate review of the district court's denial of qualified immunity. The Court of Appeals for the Seventh Circuit dismissed the appeal on the excessive force claim for lack of jurisdiction, opining that "[a] cry of 'we didn't do it'

does not present any distinctly legal issue or seek protection from legal uncertainty, the genesis of doctrines of official immunity." Pet. App. 1a-2a. The circuit court took a different tack with respect to the issue of lack of probable cause. Finding it undisputed "that an officer found plaintiff, apparently intoxicated, hitting his head against a building, and took him into custody," the court concluded that "[t]hese facts imply disorderly conduct, which supports an arrest." Pet. App. 2a. Respondent could not adduce sufficient evidence to dispute the officers' account of the arrest, and the officers' version of the arrest, "if accepted, entitles them to immunity if not to prevail outright." Pet. App. 2a. The court rejected the district court's view that summary judgment nevertheless should be denied on the false arrest claim because the excessive force allegations had to be tried. Pet. App. 2a-3a. The court reasoned that the policy considerations favoring resolution of immunity claims as early in litigation as possible compelled entry of summary judgment on the false arrest claims against petitioners. Pet. App. 3a.

Petitioners sought a writ of certiorari from the Court to review the Seventh Circuit's dismissal of their immediate appeal on the excessive force claim.

SUMMARY OF ARGUMENT

The qualified immunity doctrine exists to promote effective government by giving public officials protection against the distorting influences of potential personal liability. The doctrine, as reformulated in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), is designed to facilitate early disposition of qualified immunity claims on summary judgment. In *Mitchell v. Forsyth*, 472 U.S.

511 (1985), this Court held that the same important considerations supporting the doctrine also require that pretrial rulings denying qualified immunity be immediately appealable.

The right of immediate appeal recognized in *Mitchell* applies to all assertions of qualified immunity, not just those that might be described as focusing primarily on "legal" issues. Indeed, this Court acknowledged explicitly in *Mitchell* that qualified immunity would be appropriate in a case in which the defendant official relies on the plaintiff's inability to adduce any evidence that the official took any action contrary to plaintiff's rights. There is no basis in this Court's decisions to permit immediate appeals in only certain types of qualified immunity cases.

The distinction the Seventh Circuit imposed between "legal" and "factual" qualified immunity cases runs counter to the interests supporting immediate appeals. It would deprive some officials of the right to escape protracted discovery and trial, despite the fundamental nature of those officials' defense. The distinction also would prove to be unworkable and would lead to inconsistent and unfair results because there are no clear lines between qualified immunity defenses that are predominantly "legal" and those that are predominantly "factual." The distinction is not even likely to lead to any reduction in appellate litigation because the distinction itself will produce litigation over the appealability of certain issues.

This Court should clarify that the right of immediate appeal recognized in *Mitchell* applies to all pretrial denials of qualified immunity regardless of how

the district court's decision might be characterized. The Seventh Circuit's dismissal of petitioners' appeal on the excessive force claim should be reversed and the case should be remanded for consideration of the merits of the appeal on that issue by the court of appeals.

ARGUMENT

AN IMMEDIATE APPEAL OF A PRETRIAL RULING ON QUALIFIED IMMUNITY SHOULD ENCOMPASS ALL BASES ON WHICH QUALIFIED IMMUNITY MAY BE GRANTED.

A. The right of immediate appeal from a decision denying qualified immunity is integral to the policies of the doctrine of qualified immunity.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court redefined the test for qualified immunity of government officials, rejecting a partly subjective standard in favor of a purely objective test. "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. This purely objective standard is inextricably tied to its procedural utility. It is designed to "avoid excessive disruption of government and [to] permit the resolution of many insubstantial claims on summary judgment." *Id.*

Qualified immunity exists "to safeguard government, and thereby to protect the public at large, not to benefit its agents." *Wyatt v. Cole*, 112 S.Ct. 1827, 1833 (1992); *see also Harlow*, 457 U.S. at 814. Among the social costs of damage actions against public officials are "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Harlow*, 457 U.S. at 814. Qualified immunity reduces "perverse incentives that operate to *inhibit* officials in the proper performance of their duties." *Forrester v. White*, 484 U.S. 219, 223 (1988) (emphasis in original). Without an effective immunity doctrine, officials facing the threat of potential personal liability "may well be induced to act with an excess of caution or otherwise to skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct." *Id.*; *see also Harlow*, 457 U.S. at 814.

The Court's primary concern in *Harlow* was the "substantial costs [that] attend the litigation of the subjective good faith of government officials," which was then an element of the qualified immunity doctrine. *Id.* at 816. In addition to the "general costs" associated with exposing public officials to the risks of trial and liability, the subjective inquiry exacted "special costs" because "questions of subjective intent so rarely can be decided by summary judgment." *Id.* at 817. Wide-ranging discovery into, and subsequent trial of, the subjective motivations of government officials is "peculiarly disruptive of effective government." *Id.* at 817.

Since *Harlow*, this Court has held steadfastly to the central goal of ensuring that qualified immunity remains available as a viable means of disposing of suits at the summary judgment stage "unless [an officer's] conduct was unreasonable in light of clearly established law." *Elder v. Holloway*, 114 S.Ct. 1019, 1021 (1994). *See also Anderson v. Creighton*, 483 U.S. 635, 638 (1987). Qualified immunity thus provides an "accommodation for reasonable error," *Hunter v. Bryant*, 502 U.S. 224, 112 S.Ct. 534, 537 (1991), which protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). "One of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Siegert v. Gilley*, 500 U.S. 226, 111 S.Ct. 1789, 1793 (1991). "Immunity ordinarily should be decided by the court long before trial." *Hunter*, 112 S.Ct. at 537.

The same public interest in achieving expeditious disposition of assertions of qualified immunity provides the rationale both for the objective nature of the qualified immunity test and for the immediate appealability of qualified immunity decisions. *Mitchell v. Forsyth*, 472 U.S. 511, 524-30 (1985); *Wyatt v. Cole*, 112 S.Ct. at 1832-33. Decisions denying qualified immunity thus fit within the narrow limits of the collateral order doctrine established in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). *Mitchell*, 472 U.S. at 524-25. Pretrial qualified immunity decisions warrant this special status because "[t]he entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is

erroneously permitted to go to trial." *Mitchell*, 472 U.S. at 526 (emphasis in original).

B. Immediate appeals of qualified immunity rulings are not limited to cases in which the defendant emphasizes legal over factual arguments.

This Court in *Mitchell* anticipated this case. Just as the doctrine of qualified immunity encompasses a fundamental legal argument — the assertion that even the facts alleged do not amount to violation of a legal right — so also qualified immunity reaches the correspondingly fundamental factual defense: "Even if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts." 472 U.S. at 526. This is precisely petitioners' claim here: Notwithstanding his allegations, respondent cannot prove petitioners' involvement in any use of excessive force. The well established principles applicable to motions for summary judgment permit petitioners to put respondent to his proof on this issue. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). This Court gave no hint in *Mitchell* that this type of qualified immunity defense, recognized there as firmly within the scope of the doctrine, would for some reason be excluded from the immediately available appeal afforded by *Mitchell*.

Even if *Mitchell* were less clear on this point, the evolution of the qualified immunity doctrine has not

produced limiting distinctions between "legal" and "factual" arguments. Contrary to the Seventh Circuit's view, assertions of qualified immunity are not limited to situations like *Mitchell* in which a defendant government official can identify a particular case decided subsequent to his conduct which settles a legal right for the first time — what might be termed the classic "legal uncertainty" paradigm.[1] More often in qualified immunity cases, "[a] necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert v. Gilley*, 111 S.Ct. at 1793. Such cases do not rest on any notion of legal uncertainty at all. The defendant does not claim to have reasonably misunderstood the law at one time; the official asserts more fundamentally that the law has never proscribed his conduct, clearly or unclearly.

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[1] The essential facts in *Mitchell* were straightforward and uncontested: The Attorney General had authorized a warrantless wiretap in the exercise of the President's authority relating to national security, and conversations involving Forsyth had been intercepted. 472 U.S. at 513-14. The Attorney General's claim of immunity was deemed to turn on the "purely legal question" whether the prohibition of warrantless wiretaps in the name of national security was clearly established in 1970-71. *Id.* at 530. This Court concluded that that right was not clearly established until *United States v. United States District Court for the Eastern District of Michigan, Southern Division*, 407 U.S. 297 (1972), was decided, after the wiretap at issue was concluded.

That these types of cases emphasize analysis of law does not mean that they do not depend on particular facts. In *Mitchell*, this Court expressly recognized that "the resolution of these legal issues will entail consideration of the factual allegations that make up the plaintiff's claim for relief . . . ." 472 U.S. at 528. The question whether a clear right has been violated at all will almost always depend on consideration of the underlying facts. *See, e.g., Davis v. Scherer*, 468 U.S. 183, 192 (1984) (not unreasonable for officials to conclude they had complied with fundamentals of due process in terminating employee based on specific factual demonstration that employee had several opportunities to present his position to his superiors).

Anderson v. Creighton, 483 U.S. 635 (1987), teaches that a court considering an official's assertion of qualified immunity must traverse the full range of the law-fact spectrum. The inquiry cannot be limited to a level of abstract legal generality. To do so would upset the balance carefully calibrated in *Harlow* and transform the objective legal reasonableness test "from a guarantee of immunity into a rule of pleading." 483 U.S. at 639. "The contours of the right must be sufficiently clear that a reasonable official would understand that *what he is doing* violates that right." *Id.* at 640 (emphasis supplied). A court cannot consider "what an official is doing" without engaging in a particularized factual inquiry as part of the qualified immunity analysis.

The full scope of qualified immunity is most apparent in cases involving law enforcement officers. Police officers, without the benefit of full legal training, are called upon frequently to make difficult judgments in circumstances in which the outcome of the issue depends

on fine distinctions of fact or law.[2] Their task often is complicated further by the need to act "in circumstances that are tense, uncertain, and rapidly evolving." *Graham v. Connor*, 490 U.S. 386, 396-97 (1989). The evaluation of probable cause, for example, involves a prototypical law/fact judgment: the application of broad legal rules and elements to a constantly and minutely varying set of circumstances. That qualified immunity applies fully in this setting is clear beyond peradventure. Law enforcement officers who "reasonably but mistakenly conclude that probable cause is present" are entitled to qualified immunity. *Anderson v. Creighton*, 483 U.S. at 641. The inquiry does not become any less objective because it "will often require examination of the information possessed by the searching officials." *Id.* On an assertion of qualified immunity, a court is engaged to answer "the objective (albeit fact-specific) question whether a reasonable officer could have believed [the] warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed." *Id.*; *see also Hunter v. Bryant*, 112 S.Ct. at 537 ("court should ask whether the agents acted

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[2] "Such officials as police officers or prison wardens . . . routinely make close decisions in the exercise of the broad authority that necessarily is delegated to them. These officials are subject to a plethora of rules, 'often so voluminous, ambiguous, and contradictory, and in such flux that officials can only comply with or enforce them selectively.'" *Davis v. Scherer*, 468 U.S. at 196 (quoting P. Schuck, Suing Government 66 (1983)). "[O]fficials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office." *Scheuer v. Rhodes*, 416 U.S. 232, 246 (1974).

reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact").[3]

C. Any restriction of immediate appeals based on their relative legal or factual emphasis would undermine the purposes of the qualified immunity doctrine and prove to be unworkable.

The Seventh Circuit viewed petitioners' assertion that "we didn't do it" as an insufficiently "legal" defense because it does not rely on "legal uncertainty," which the court characterized as "the genesis of doctrines of official immunity." Pet. App. 1a-2a. As demonstrated above, however, qualified immunity is not limited to cases of classic legal uncertainty.[4] It applies equally to

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[3] Decision of such qualified immunity issues on summary judgment will not always be possible or appropriate. There are cases in which there are genuine disputes about the information the officers had at the time they acted, but the simple fact that an official was called upon to make judgments about a set of facts does not inevitably produce a triable issue. *Hunter v. Bryant*, 112 S.Ct. at 536-37. The right to an interlocutory appeal remains essential in this and all other types of denials of qualified immunity to ensure that public officials are not required to defend protracted litigation if a district court erroneously denies summary judgment.

[4] It is not clear whether the Seventh Circuit means to exclude fact-based defenses entirely from the realm of qualified immunity defenses or whether it recognizes them as

the more fundamental claim that the right asserted by the plaintiff has never been established. That defense — "we did it, but it isn't illegal" — is simply the complement at the legal end of the spectrum to the equally fundamental factual defense of "we didn't do it." Both of these formulations fit under the umbrella of qualified immunity, which can be captured in the phrase, "what we did was not clearly illegal." Moreover, primarily fact-based assertions of qualified immunity will not always be as simple as "we didn't do it." Federal Rule of Civil Procedure 56 permits a defendant to argue a mixture of undisputed facts and acceptance of the plaintiff's version of certain facts.[5] The distinction the Seventh Circuit attempts to impose will prove unworkable as the boundaries of law and fact and assumed fact become blurred.

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assertions of qualified immunity but would exclude them from permissible immediate appeals. Either approach is erroneous.

[5] Thus, for example, one police officer might argue that, even accepting the plaintiff's allegations of fact, probable cause existed to make an arrest and the officer therefore is immune. Another police officer might argue that her version of the facts is true and the plaintiff cannot prove facts to the contrary. A third officer might offer that all of the plaintiff's allegations but one can be accepted as true and that the plaintiff can adduce no evidence to support the single disputed contention. If the plaintiff fails to advance competent proof of the one issue, summary judgment certainly is appropriate. *Celotex Corp. v. Catrett*, 477 U.S. at 324. There is no principled basis to distinguish among these varying situations to declare that an immediate appeal should not be available in one or more of them.

The Court need not look far for an example of the irrationality of the proposed distinction. At the same time it was rejecting jurisdiction of petitioners' excessive force appeal, the Seventh Circuit reversed the district court's denial of qualified immunity on the false arrest and related claims. The argument on those claims, however, was no more "legal," and it certainly was not based on "legal uncertainty." Rather, it was a fact-based defense similarly predicated on respondent's inability to produce any evidence that the officers had any information that would detract from their reasonable conclusion that they had probable cause to arrest respondent for disorderly conduct. No principled distinction can be drawn between a conclusion that the undisputed facts provided the officers a reasonable basis to proceed with an arrest and a determination that virtually the same information provided the officers with a reasonable basis to conclude that it was necessary to exert force to overcome respondent's resistance to their efforts to place him under arrest. Whatever might be said for a conclusion of no disputed facts on the former point and a genuine dispute of fact concerning the reasonableness of the extent of the force exerted on the latter point, there can be no justification for the position that the former point can be appealed immediately while appeal on the latter issue cannot even be entertained.

The approach adopted by the Seventh Circuit would fragment the qualified immunity doctrine, at least with respect to immediate appealability. This Court has sought to preserve the doctrine's consistent set of principles:

> [W]e have been unwilling to complicate qualified immunity analysis by making the

> scope or extent of immunity turn on the precise nature of various officials' duties or the precise character of the particular rights alleged to have been violated. An immunity that has as many variants as there are modes of official action and types of rights would not give conscientious officials that assurance of protection that it is the object of the doctrine to provide.

Anderson, 483 U.S. at 643. Variations in the appealability of pretrial qualified immunity orders would be no less destructive to the integrity of the doctrine.

The Seventh Circuit's attempt to exclude all but "legal uncertainty" qualified immunity cases from immediate appeals not only restricts the range of proper qualified immunity defenses, it also irrationally elevates one aspect of the test — legal uncertainty — above the doctrine itself and the central policy of expeditiously disposing of those cases which can be decided on summary judgment. If the Seventh Circuit's approach were to prevail, an official who is mistakenly identified by a plaintiff and who did nothing wrong at all, on an erroneous failure by a district court to recognize the official's complete lack of participation, could be held to answer through discovery and a full trial without an opportunity to appeal. Another official, who actually violated a citizen's rights but who is immune because of not yet fully evolved law at the time of the wrong, could invoke his right to an immediate appeal, which would enable him properly to escape the burdens of protracted litigation. Such a distinction runs counter to the policies at the core of the qualified immunity doctrine.

At most, limiting immediate appeals in this manner would prune from the circuit courts' dockets a certain number of appeals, but even that saving of judicial resources would prove ephemeral. First, there is no indication that this category of cases is numerous or presents any special burden on the courts of appeals. Second, any argument premised on saving judicial resources must consider both the district courts and the circuit courts. When qualified immunity is granted on appeal, the judicial system as a whole is spared extended litigation, including the far greater burden of a trial in the district court. Only when immediate appeals lacking merit are taken will there be any ultimate cost, and that is a cost which this Court has already deemed appropriate in light of the greater benefits to society as a whole of permitting immediate qualified immunity appeals. Finally, the Seventh Circuit's distinction will spawn additional appellate litigation over the immediate appealability of qualified immunity decisions. Whatever limited savings in appellate litigation might be achieved likely would be negated by this additional litigation, which is entirely unproductive from the standpoint of the social costs to be avoided by the qualified immunity doctrine.

CONCLUSION

For the reasons stated, the decision of the court of appeals should be reversed and this case should be remanded with instructions that the court of appeals consider the merits of petitioners' appeal on the excessive force claims.

Respectfully submitted,

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